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IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

NEWPORT NEWS SHIPBUILDING
AND DRYDOCK COMPANY,
Petitioner,

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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BRIEF AMICUS CURIAE OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL IN SUPPORT OF PETITIONER

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	iii
INTEREST OF THE AMICUS CURIAE	1
STATEMENT OF THE CASE	3
SUMMARY OF ARGUMENT	5
ARGUMENT	7
I. THE COMMISSION'S POSITION ON PREGNANCY BENEFITS FOR DEPENDENTS OF EMPLOYEES IS CONTRARY TO BOTH THE PLAIN LANGUAGE OF THE PREGNANCY DISCRIMINATION ACT OF 1978 AND ITS LEGISLATIVE HISTORY	7
A. The Plain Meaning of the Pregnancy Discrimination Act of 1978 Limits the Scope of that Statute to Pregnant Employees and Precludes Its Application to Pregnant Dependents of Employees	7
B. The Legislative History of the Pregnancy Discrimination Act Supports the Conclusion That This Statute Does Not Reach the Issue of Dependents' Benefits	10
C. The Commission's Arguments to This Court Relying on the Language and the Legislative History of the Pregnancy Discrimination Act Are Not Consistent with the Rationale Set Forth By the Commission When It First Issued Its Interpretive Guidelines	14
II. THE SEGMENTS OF THE LEGISLATIVE HISTORY RELIED UPON BY THE COMMISSION FAIL TO SUPPORT THE COMMISSION'S INTERPRETATION OF THE ACT	15

TABLE OF CONTENTS—Continued

Page

III. THE APPROACH OF THE FOURTH CIRCUIT MAJORITY IS CONTRARY TO THE PRINCIPLES OF TITLE VII WHICH CONGRESS INTENDED WOULD APPLY TO THE QUESTION OF DEPENDENTS' BENEFITS 20

CONCLUSION 25

TABLE OF AUTHORITIES

CASES — Page

American Tobacco Co. v. Patterson, 456 U.S. 63 (1982) 9, 16
Chastang v. Flynn & Emrich Co., 541 F.2d 1040 (4th Cir. 1976) 22
Consumer Product Safety Commission v. GTE Sylvania, Inc., 447 U.S. 102 (1980) 16
Diaz v. Pan American World Airways, Inc., 442 F.2d 385 (5th Cir. 1971) 22-23
Dothard v. Rawlinson, 433 U.S. 321 (1977) 23
EEOC v. Colby College, 589 F.2d 1139 (1st Cir. 1978) 22
EEOC v. Emerson Electric Co., 539 F. Supp. 153 (E.D. Mo.), *appeal docketed*, No. 82-1647 (8th Cir. May 27, 1982) 3
EEOC v. Joslyn Manufacturing & Supply Co., 524 F. Supp. 1141 (N.D. Ill. 1981), *appeal docketed*, No. 82-1634 (7th Cir. April 14, 1982) 3
EEOC v. Lockheed Missiles & Space Co., 680 F.2d 1243 (9th Cir. 1982) 3, 6, 8, 23
Faraca v. Clements, 506 F.2d 956 (5th Cir. 1975) .. 23
Geduldig v. Aiello, 417 U.S. 484 (1974) 17, 23
General Electric Co. v. Gilbert, 429 U.S. 125 (1976) 4, 15, 21
McDonald v. Santa Fe Trail Transportation Co., 427 U.S. 273 (1976) 9
Mohasco Corp. v. Silver, 447 U.S. 807 (1980) 7
Rosen v. Public Service Electric and Gas Co., 477 F.2d 90 (3d Cir. 1973) 22
United States v. Turkette, 452 U.S. 576 (1981) 16
United Teachers—Los Angeles v. Board of Education, 29 Empl. Prac. Dec. ¶ 32,759 (C.D. Cal. 1982) 3

STATUTES

Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e *et seq.* (Title VII) 2
Pregnancy Discrimination Act of 1978, Pub. L. No. 95-555, 92 Stat. § 2706, 42 U.S.C. § 2000e-(k) (1978 Supp.) ..... *passim*

TABLE OF AUTHORITIES—Continued

LEGISLATIVE MATERIALS	Page
Hearings on S. 995, 95th Cong., 1st Sess., before the Subcommittee on Labor of the Committee on Human Resources, Senate (April 26, 27 and 29, 1977)	16
Hearings on H.R. 5055 and H.R. 6075 before the Subcommittee on Employment Opportunities of the House Committee on Education and Labor, 95th Cong., 1st Sess. (April 6, 1977)	19
H.R. Rep. No. 95-948, 95th Cong., 2d Sess. (March 13, 1978)	10, 12
Senate Committee on Labor and Human Resources, 96th Cong., 2d Sess., Legislative History of the Pregnancy Discrimination Act of 1978 (1980)	*passim*
S. Rep. No. 95-331, 1st Sess. (July 6, 1977)	10, 21
MISCELLANEOUS MATERIALS	
Equal Employment Opportunity Commission, Final Interpretive Guidelines on Sex Discrimination, including Questions and Answers on the Pregnancy Discrimination Act, 44 Fed. Reg. 23804 (29 C.F.R. Part 1604.10, and Appendix)	4, 14
Sands, Sutherland Statutory Construction (4th ed. 1973)	18

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BRIEF AMICUS CURIAE OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL IN SUPPORT OF PETITIONER

The Equal Employment Advisory Council respectfully submits this brief as amicus curiae with the written consent of the parties. Statements of consent have been submitted to the Clerk of the Court. This brief urges that the decision of the Fourth Circuit be reversed, and thus the brief supports the position of the Petitioner.

INTEREST OF THE AMICUS CURIAE

The Equal Employment Advisory Council is a voluntary nonprofit association organized to promote the common interest of employers and the general public in sound government policies, procedures and requirements pertaining to nondiscriminatory employment practices. Its membership comprises a broad segment of the employer community in the United States, including both individual

employers and trade and industry associations. Its governing body is a board of directors composed primarily of experts and specialists in the field of equal employment opportunity whose combined experience gives the Council a unique depth of understanding of the practical and legal considerations relevant to the proper interpretation and application of EEO policies and requirements. The members of the Council are firmly committed to the principles of nondiscrimination and equal employment opportunity.

Substantially all of the Council's members, or their constituents, are subject to the provisions of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e *et seq.*, including the Pregnancy Discrimination Act of 1978, 42 U.S.C. § 2000e-(k) (1978 Supp.), and these members are affected by the issue of whether the Pregnancy Discrimination Act can be interpreted to require employers to provide disability coverage for the pregnancies of the dependents of employees. They are directly concerned with the question presented for review in this case: Does an employer that provides health insurance benefits for employees and their dependents discriminate against male employees in violation of Title VII of the Civil Rights Act of 1964, as amended by the Pregnancy Discrimination Act of 1978, by providing only limited coverage for the pregnancy-related expenses incurred by the dependents of employees. Because of its interest in this issue, the Council participated as amicus curiae in the appeal in this case in the Fourth Circuit and in an appeal in a separate case in the Ninth Circuit which raised the same question. *Newport News Shipbuilding and Dry Dock Company v. EEOC*, 667 F.2d 448 (4th Cir.), *adopted en banc*, 682 F.2d 113 (1982), and *EEOC v. Lockheed Missiles & Space Co.*, 680 F.2d 1243 (9th Cir. 1982), *petition for cert. filed* (U.S. Dec. 15, 1982) (No. 82-1006).[1]

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[1] Because of its interest in equal employment opportunity issues, the Council has participated as amicus curiae in other cases before

STATEMENT OF THE CASE

The case now before the Court is one of several in which federal courts have been asked to rule on the validity of the Equal Employment Opportunity Commission's interpretation of the law on sex discrimination with respect to pregnancy benefits for dependents of employees. In this case, the Fourth Circuit Court of Appeals, in a 5 to 3 decision, supported the Commission's interpretation. *Newport News Shipbuilding and Dry Dock Company v. EEOC*, 682 F.2d 113, *adopting en banc*, 667 F.2d 448 (1982). This decision reversed a district court ruling which had declared the Commission's interpretation to be contrary to law, 510 F. Supp. 66 (E.D. Va. 1981).[2]

This case arises from a declaratory judgment action filed by Newport News Shipbuilding and Dry Dock Company ("Shipyard"), the Petitioner in this Court. The district court found that the Shipyard maintains a medical plan which pays a major part of the costs of medical and hospital care for non-occupational illnesses and accidents of the dependents of Shipyard employees. Under the plan, maternity benefits for dependents of all em-

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this Court. *See e.g., Arizona Governing Committee v. Norris*, (U.S. No. 82-52); *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248 (1981); *Furnco Construction Co. v. Waters*, 438 U.S. 567 (1978); and *International Brotherhood of Teamsters v. United States*, 431 U.S. 324 (1977).

[2] In a case raising similar issues, *EEOC v. Lockheed Missiles and Space Co.*, 680 F.2d 1243 (1982), the Ninth Circuit Court of Appeals rejected the Commission's interpretation, as did district courts in *EEOC v. Emerson Electric Co.*, 539 F. Supp. 153 (E.D. Mo.), *appeal docketed*, No. 82-1647 (8th Cir. May 27, 1982), and *EEOC v. Joslyn Mfg. & Supply Co.*, 524 F. Supp. 1141 (N.D. Ill. 1981), *appeal docketed*, No. 82-1634 (7th Cir. April 14, 1982). In *United Teachers—Los Angeles v. Board of Education*, 29 Empl. Prac. Dec. ¶ 32,759 (C.D. Cal. 1982), the district court adopted the approach of the Commission, but the vitality of that decision is doubtful in light of the Ninth Circuit's subsequent ruling to the contrary in *Lockheed*.

ployees are limited to $500 of the hospital charges, with additional allowances for hospital costs only if there are complications.

The Commission's interpretation of the law with respect to providing pregnancy benefits for the dependents of employees requires that if an employer provides coverage for the medical conditions of the spouses of employees, the level of coverage for pregnancy-related medical conditions must be the same as the level of coverage for all other medical conditions of the spouses of female employees. This interpretation is contained in Question and Answer No. 21 and No. 22 appended to the Final Interpretive Guidelines on sex discrimination published by the Commission on April 20, 1979.[3] The interpretive guidelines were issued following enactment of the Pregnancy Discrimination Act of 1978 as an amendment to Title VII of the Civil Rights Act of 1964, as amended.

The district court found that the legislative history of the Pregnancy Discrimination Act explicitly stated that the legislation was not intended to reach the issue of dependents' benefits and that the question of dependents' benefits would have to be resolved utilizing existing principles of Title VII law. The district court concluded that the Pregnancy Discrimination Act did not change the application of Title VII to sex discrimination in any way except for those situations involving pregnant employees or applicants for employment. The court held that in situations not involving pregnant employees or applicants for employment, the principles of Title VII law remain those enunciated by this Court, prior to the Pregnancy Discrimination Act, in *General Electric Co. v. Gilbert*, 429 U.S. 125 (1976). In that decision, the Court held that the exclusion of pregnancy-related benefits from a disability program does not constitute gender-based dis-

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[3] The relevant portions of Title VII, the Pregnancy Discrimination Act, and the Commission's Questions and Answers are set forth in the Petition for a Writ of Certiorari filed September 10, 1982.

crimination and that, absent a showing of gender-based effect, there could be no violation of Title VII.

Applying this principle, the district court held that the Shipyard's medical plan, which provides disability coverage for dependents of employees but limits that coverage with respect to the pregnancy-related expenses of dependent spouses of employees, did not constitute gender-based discrimination against male employees. The district court further held that the Commission's interpretive guidelines, as expressed in Questions and Answers No. 21 and No. 22, are contrary to law and of no force and effect.

The district court's decision was reversed in the Fourth Circuit where the panel majority adopted the view that the intent of the new statute was to equate pregnancy with sex and thus to make all distinctions based on pregnancy distinctions based on sex. 667 F.2d at 451. The dissent in the Fourth Circuit reasoned that pregnancy-based classifications are legal except to the extent that *General Electric* has been limited by the new law, and that had Congress intended to entirely undo *General Electric*, it would have done so without the reference in the statute to a woman's ability or inability to work. 667 F.2d at 452. Upon rehearing *en banc*, five judges adopted the opinion of the panel majority and three judges adopted the opinion of the dissent. 682 F.2d 113.

SUMMARY OF ARGUMENT

The Pregnancy Discrimination Act represents a Congressional judgment that pregnancy must not be a basis for arbitrary distinctions which limit the employment opportunities of pregnant employees or applicants for employment. Specifically, the language of the Act provides that for employment purposes women affected by pregnancy are to be treated the same as other individuals on the basis of their "ability or inability to work."

In seeking to expand the scope of the PDA so as to apply to the pregnancies of dependents, the Commission has ignored the inherent limitation expressed by the

"ability or inability to work" language. This same weakness is evident in the opinion of the Fourth Circuit majority, which adopted the Commission's approach. In sharp contrast, the approach of the Ninth Circuit in *EEOC v. Lockheed Missiles & Space Co.*, 680 F.2d 1243 (1982), and the approach of the dissent in the Fourth Circuit both accommodate the "ability or inability to work" language, and it is these approaches which should guide this Court's consideration of the issue here. Furthermore, the Commission and the Fourth Circuit majority have virtually ignored the explicit language of the legislative history of the PDA, which states that the purpose of the Act is to eliminate arbitrary barriers to equal employment opportunity for pregnant employees, and that the Act *does not* reach the question of dependents' benefits. Congress intended that question to be resolved by using basic principles of Title VII which were unchanged by the PDA.

The Commission's arguments that its interpretation is supported by the plain language of the PDA and its legislative history are not consistent with the rationale expressed by the Commission when it first published its interpretive guidelines in April 1979. At that time, the Commission explained that its guidelines on dependents' benefits were arrived at by utilizing existing Title VII principles rather than the PDA.

In attempting to justify its interpretation of the statute in this Court, the Commission has relied on a few remarks taken from the legislative debates. These passages, however, do not constitute the type of clear and convincing legislative history required to overcome the specific language of the Senate Committee Report and the statements of the bill's principal sponsor indicating that the legislation applied only to pregnant employees. In light of the very narrow scope of the PDA, the district court correctly ruled that in situations not involving pregnant employees or applicants for employment, a limitation on pregnancy-related benefits does not constitute gender-based employment discrimination.

ARGUMENT

I. THE COMMISSION'S POSITION ON PREGNANCY BENEFITS FOR DEPENDENTS OF EMPLOYEES IS CONTRARY TO BOTH THE PLAIN LANGUAGE OF THE PREGNANCY DISCRIMINATION ACT OF 1978 AND ITS LEGISLATIVE HISTORY.

A. The Plain Meaning of the Pregnancy Discrimination Act of 1978 Limits the Scope of that Statute to Pregnant Employees and Precludes Its Application to Pregnant Dependents of Employees.

The plain language of the Pregnancy Discrimination Act of 1978 (PDA) requires that for employment purposes, women affected by pregnancy are to be treated the same as other persons who are "similar in their ability or inability to work." The Commission discounts this language and asserts that the scope of the statute is not limited to employees. It asks this Court to approve an expanded interpretation of the statute which essentially would require that dependents affected by pregnancy are to be treated the same as other dependents. The "ability or inability to work" language cannot simply be read out of the statute. As this Court stated in *Mohasco Corp. v. Silver*, 447 U.S. 807, 825 (1980), the Commission's " 'interpretation' of the statute cannot supersede the language chosen by the Congress." In this instance, the language chosen by Congress—"similar in their ability or inability to work"—is a strong indication that Congress did not contemplate that this statute would be applied to govern the treatment of pregnant dependents.

In the decision of the Fourth Circuit,[4] the majority opinion indicates that the "similar in their ability or inability to work" language does not suggest that the pregnant person must be an employee. This conclusion appears to ignore the fact that only employees (or applicants for employment) reasonably may be compared to one another

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[4] *Newport News Shipbuilding and Dry Dock Company v. EEOC*, 667 F.2d 448 (4th Cir.), *adopted en banc*, 682 F.2d 113 (1982).

on the basis of similarity in their "ability or inability to work." Indeed, as the dissent pointed out:

> To determine whether a pregnant woman is being treated the same as some other person who has the similar ability or inability to work, the pregnant woman, by logical necessity, must also be an employee. To hold otherwise is to simply ignore the language of the Act.

Newport News, 667 F.2d at 452 (J. Hall, dissenting). In considering what weight should be accorded to the reasoning in the majority opinion, it should be recognized that, in attempting to read the statute so that it "contains no intimation that benefits payable with respect to the disability of a spouse are excluded from the statute's reach," 667 F.2d at 450, the majority is at odds with the unambiguous statements in the legislative history that the Act does not reach the issue of benefits for non-employees.[8]

The reasoning of the Fourth Circuit majority was presented to the Ninth Circuit by the Commission in *EEOC v. Lockheed Missiles and Space Co.*, 680 F.2d 1243 (1982). That court rejected the Commission's arguments and concluded that by choosing the definitional form of amendment, Congress expressly limited the scope of its action to women employees. The *Lockheed* court found that the first clause of the PDA, when read together with Section 703(a)(1) of Title VII, defeats the Commission's contention that the PDA may be applied to male employees. Furthermore, the court reasoned:

> The second clause in its reference to women employees ("employment-related purposes;" "other persons not so affected but similar in their ability or inability to work") clarifies the Congressional intent by restating the substance of the first clause in other than definitional terms, and making it clear that its limitation to employees was not inadvertent.

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[8] See discussion of legislative history of pp. 10-13, *infra*.

680 F.2d at 1245.[6] Both the approach of the Ninth Circuit and the approach of the dissent in the Fourth Circuit accommodate rather than ignore the "ability or inability to work" language included by Congress in the statute. It is well-settled that in questions of statutory construction, the starting point must be the language used by Congress, and it is assumed that the intent of Congress is expressed by the ordinary meaning of those words. See *American Tobacco Co. v. Patterson*, 456 U.S. 63, 68-69 (1982), and cases cited therein. Although the Commission asserts that nothing in the statute limits its scope to the pregnancies of employees, the plain meaning of the "ability or inability to work" language is that such a limitation was intended.[7] Further-

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[6] The Ninth Circuit read the first clause of the PDA as a definitional clause:

> The quoted portion of § 2000e(k) can be divided into two clauses separated by the semicolon. The first is simply definitional: The word "sex" as used in § 703(a) is to be read to mean "pregnancy, childbirth or related medical conditions." Reading PDA against § 703(a)(1) the latter now provides that it shall be an unlawful employment practice for an employer to "discriminate against any individual with respect to his compensation * * * because of *such individual's* * * * pregnancy, childbirth or related medical conditions." . . . The amendment would have the same effect on § 703(a)(2). This can hardly be read to apply to male employees. By choosing the definitional form of amendment, Congress has expressly limited the scope of its action to women employees.

680 F.2d at 1245.

[7] In its "Brief for the Respondent" (hereinafter EEOC Brief), filed in response to the petition for writ of certiorari, the Commission has argued that the statute is not limited to the pregnancies of employees. See EEOC Brief at 8. The Commission suggests that the language "ability or inability to work" is similar to the phrase in 42 U.S.C. § 1981 which guarantees all persons the same rights "as is enjoyed by white citizens." The Commission points out that in *McDonald v. Santa Fe Trail Transportation Co.*, 427 U.S. 273 (1976), this Court held that Section 1981 protects both nonwhites and whites. What the Commission overlooks, however, is that the Court in *Santa Fe* began its analysis by noting that Section 1981 "ex-

more, such limitation does not lead to an absurd or futile result, since the very purpose of this legislation was to remove the barriers to equal employment opportunity for working women affected by pregnancy.[8] This purpose is served fully and fairly without expanding the statute beyond its plain meaning to include the pregnancies of non-employees.

B. The Legislative History of the Pregnancy Discrimination Act Supports the Conclusion That This Statute Does Not Reach the Issue of Dependents' Benefits.

Congress did not intend the Pregnancy Discrimination Act to apply to the issue of medical benefits for the dependents of employees. This intention is stated in a forthright manner in the Senate committee report on the proposed legislation.[9] The intention to limit the scope of

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plicitly applies to '*all* persons' . . . ." This explicit statutory language, the Court found, was supplemented by legislative history indicating that the provision had been introduced as a "bill . . . to protect *all* persons in the United States in their civil rights . . . ." 427 U.S. at 287. In sharp contrast, the Pregnancy Discrimination Act contains no reference equivalent to the "all persons" language in Section 1981. While the reasoning of *Santa Fe* might be appropriate to support an argument that Title VII's prohibition on sex discrimination applies to men as well as women, the amicus respectfully suggests that *Santa Fe* simply does not support an argument that the PDA applies to pregnancies of persons who are not employees.

[8] *See* S. Rep. No. 95-331 (95th Cong., 1st Sess., July 6, 1977), *reprinted in* Senate Comm. on Labor and Human Resources, 96th Cong., 2d Sess., Legislative History of the Pregnancy Discrimination Act of 1978 at 38 (1980) (hereinafter Legislative History). See also H. Rep. No. 95-948 (95th Cong., 2d Sess., March 13, 1978), *reprinted in* Legislative History at 147.

[9] S. Rep. No. 95-331 (95th Cong., 1st Sess., July 6, 1977) at 5-6, *reprinted in* Legislative History at 42-43, includes the following discussion of medical benefits:

> Questions were raised in the committee's deliberations regarding how this bill would affect medical coverage for dependents of employees, as opposed to employees themselves. In this context it must be remembered that *the basic purpose of this*

the statute to the pregnancies of employees also is demonstrated dramatically in a colloquy during debate when Senator Hatch asked Senator Williams to clarify the words, "women affected by pregnancy."

Senator Williams, the principal sponsor of the Senate bill (S. 995) which was to become the PDA, was chairman of both the Senate Committee on Human Resources and its Subcommittee on Labor which considered the bill. Senator Hatch, a member of the Committee on Human Resources who ultimately voted for the bill, was active during the floor debate, offering several amendments to the bill and seeking clarification from the sponsors on various aspects of the bill. In the course of this colloquy, Senator Hatch expressed concern as to whether the phrase "women affected by pregnancy" was limited to pregnant employees:

> Indeed, under the present language of the bill, it is arguable that spouses of male employees are covered by this civil rights amendment. One might even argue that other female dependents are covered . . . . Could the sponsors clarify exactly whom the phrase intends to cover?

Legislative History at 80 (September 16, 1977). Senator Williams responded that he did not see "how one can read into this any pregnancy other than that pregnancy that relates to the employee, and if there is any ambiguity, let it be clear here and now that this is very precise. It deals with a woman, a woman who is an employee, ..." Legislative History at 80.

The Commission, apparently assuming that the meaning of the phrase "women affected by pregnancy" can be read differently for income maintenance plans than for

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bill is to protect women employees, it does not alter the basic principles of title VII law as regards sex discrimination. Rather, this legislation clarifies the definition of sex discrimination for title VII purposes. Therefore the question in regard to dependents' benefits would be determined on the basis of existing title VII principles (emphasis added).

medical benefits plans, has asserted that Senator Williams' remarks were limited to income maintenance plans (EEOC Brief at 10 n.11). The colloquy, however, did not end at this point. Even if it is assumed that during the above-quoted exchange Senator Williams was not giving a complete response to the question of "exactly whom that phrase intends to cover," it nevertheless may be noted that Senator Hatch continued to press his inquiry and that Senator Williams responded without equivocation or reservation:

> Senator Hatch: So the Senator is satisfied that though the committee language I brought up, "women affected by pregnancy" seems to be ambiguous, what it means is that this act only applies to the particular woman who is actually pregnant, who is an employee and has become pregnant after her employment?
>
> Senator Williams: Exactly.

Legislative History at 80.

The statements by Senator Williams indicating that the statute is narrowly drawn in that it applies only to pregnant employees is significant, not only because of his role as the principal sponsor of the legislation, but also because such a limitation is consistent with the purpose of the legislation as expressed numerous times in the legislative history.

The report of the Senate Human Resources Committee stated that S. 995 was introduced to "insure that working women are protected against all forms of employment discrimination based on sex."[10] In discussing the basic

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[10] S. Rep. No. 95-331. (95th Cong., 1st Sess., July 6, 1977) at 3, *reprinted in* Legislative History at 40. Similar language appears in the record of the House Committee on Education and Labor, H. Rep. No. 95-948 (95th Cong., 2d Sess., March 13, 1978) at 3, *reprinted in* Legislative History at 149:

> H.R. 6075 was introduced to change the definition of sex discrimination in Title VII to reflect the commonsense view and to ensure that *working women* are protected against all forms of employment discrimination based on sex (emphasis added).

principles of the legislation, the Senate Report explained that

> the bill does not require employers to treat pregnant women in any particular manner with respect to hiring, permitting them to continue working, providing sick leave, furnishing medical and hospital benefits, providing disability benefits, or any other matter. The bill would simply require that pregnant women be treated the same as other employees *on the basis of their ability or inability to work.*

Legislative History at 41 (emphasis added). During the floor debate, Senator Javits, the ranking minority member of both the Senate Human Resources Committee and its Subcommittee on Labor which considered the bill, spoke of the limited purpose to be served by the PDA:

> This legislation does not represent a new initiative in employment discrimination law, neither does it attempt to expand the reach of title VII of the Civil Rights Act of 1964 into new areas of employment relationships. Rather, this bill is simply corrective legislation, designed to restore the law with respect to *pregnant women employees* to the point where it was last year, before the Supreme Court's decision in *Gilbert v. General Electric Corp.*, 426 U.S. 125 (1976).

Legislative History at 66 (emphasis added).[11]

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[11] Similar expressions of intent were made by the principal sponsors of the legislation in the House. Congressman Hawkins, who introduced the House bill (H.R. 6075), offered the following explanation of the bill's "narrow approach" during floor debate on July 18, 1978:

> H.R. 6075 was introduced during the first session of the 95th Congress to clarify Congressional intent that sex discrimination includes discrimination based on pregnancy and specifically to define the standards which require that *pregnant workers* be treated the same as other employees on the basis of their ability or inability to work. This legislation reflects no new legislative mandate of Congress. . . .

[Footnote continued on page 14]

C. The Commission's Arguments to This Court Relying on the Language and the Legislative History of the Pregnancy Discrimination Act Are Not Consistent with the Rationale Set Forth By the Commission When It First Issued Its Interpretive Guidelines.

In the brief filed in response to the petition for certiorari in this case, the Commission has argued that the language of the Pregnancy Discrimination Act makes clear that denial of pregnancy benefits to the dependents of male employees constitutes impermissible discrimination. (EEOC Brief at 7-9). It is noteworthy, however, that when it published its interpretive guidelines, the Commission acknowledged that certain questions were not answered by the language of the PDA and that existing principles of Title VII must be applied to resolve such questions. Specifically, the Commission stated:

> The legislative history of the Pregnancy Discrimination Act states explicitly that existing principles of Title VII law would have to be applied to resolve the question of benefits for dependents. (S. Rep. No. 95-331 at 6.)

44 Fed. Reg. 23804, April 20, 1979. At that time, the Commission also acknowledged that its position on the issue of dependents' benefits was arrived at by using established Title VII principles, as opposed to the specific language of the new PDA. *Id.*

These statements by the Commission from 1979 appear to be at odds with the arguments set forth in the Commission's initial brief in this case. Indeed, the Commission now reads the PDA as a statute written in the broadest possible terms which is in no way limited to the

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[11] [Continued]

Legislative History at 166 (emphasis added). Thus, the Commission is incorrect in asserting that the PDA was introduced by Congress to abolish completely all pregnancy-related distinctions in fringe benefits, whether or not an employee pregnancy is involved.

pregnancies of employees.[12] Thus, while the language of the relevant interpretive guidelines has not changed since April 1979, the Commission appears to have adopted a new rationale to serve as a basis for its interpretations. Such inconsistency made it appropriate for the district court to accord no deference to the Commission's guidelines.[13]

II. THE SEGMENTS OF THE LEGISLATIVE HISTORY RELIED UPON BY THE COMMISSION FAIL TO SUPPORT THE COMMISSION'S INTERPRETATION OF THE ACT.

The Commission has acknowledged that in considering the Pregnancy Discrimination Act, Congress focused its attention on the effects of pregnancy discrimination on women workers. The Commission argues, however, that the statute is not limited by this legislative focus on women workers. As shoring for its expanded interpretation of the statute, the Commission relies on a few passages in the legislative debates. In examining these passages, it is important to recognize the burden carried by the Commission. When the government chooses to argue that the plain meaning of a statute is not the meaning intended, it has the burden of supporting its interpretation by *clear* expressions of intent from the legislative history.[14] The Commission's arguments here fall far short of this requirement.

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[12] See EEOC Brief, filed in response to petition for writ of certiorari, at 8.

[13] In *EEOC v. Lockheed*, the Ninth Circuit concluded that the Commission's answer to its Question 21 "is not based on a contemporaneous interpretation of PDA but rather on its erroneous view of pre-existing Title VII principles" 680 F.2d at 1246 n.3. See also *General Electric Co. v. Gilbert*, 429 U.S. 125, 141-143 (1976) where the Court refused to give deference to the Commission's 1972 sex discrimination guidelines which conflicted with earlier pronouncements by the agency.

[14] As this Court has recognized, it is a "familiar canon of statutory construction that the starting point for interpreting a statute

In attempting to meet its burden, the Commission has offered two statements made by senators during the final debate. Most heavily relied on are the words of Senator Bayh on September 16, 1977. To put these remarks in context it must be noted that Senator Bayh was not the principal sponsor of the bill nor was he a member of the Senate Committee on Human Resources (which had considered and reported on the bill following hearings conducted by its Subcommittee on Labor). Senator Bayh was simply *one* of 30 senators listed as co-sponsors of the bill, and he spoke in support of the legislation on three separate occasions: (1) an individual statement offered to the Senate on March 18, 1977, when he placed in the record a fact sheet explaining the bill;[15] (2) in testimony on April 26, 1977, as a witness before Senator Williams' Subcommittee;[16] and (3) in remarks made during the floor debate on September 16, 1977.[17]

These three statements by Senator Bayh are virtually identical in that they begin with an outline of the Supreme Court decision in *Gilbert* and a summary of the bill's provisions. The Senator then discussed in some detail the anticipated costs which the nation's employers would have to bear as a result of the bill, and he concluded by offering specific statistics from a company in his home state to show that the costs of compliance would

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is the language of the statute itself. Absent a clearly expressed legislative intention to the contrary, that language must ordinarily be regarded as conclusive." *Consumer Product Safety Commission v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980). See also *American Tobacco Co. v. Patterson*, 456 U.S. 63, 68-69 (1982), which invoked this canon in its interpretation of the language in Section 703(h) of Title VII of the Civil Rights Act of 1964, and *United States v. Turkette*, 452 U.S. 576, 580 (1981).

[15] Legislative History at 17-22.

[16] Hearings on S. 995 Before the Subcommittee on Labor of the Senate Committee on Human Resources, 95th Cong., 1st Sess. at 6-19 (April 26, 1977).

[17] Legislative History at 72-77.

not be burdensome. The remarks concerning pregnancy benefits for the dependents of male employees, however, appear *only* in the Senator's statement of September 16, 1977.[18] The Commission urges that these remarks indicate Senator Bayh's belief that the PDA extended to benefits for dependents. In asking the Court to accept this interpretation, however, the Commission offers no explanation as to why the Senator never once included dependents' benefits in his detailed discussions of the expected costs of this legislation. Not only is there no mention of dependents' benefits in the Senator's March 18 fact sheet or in his April 26 testimony, but there is no reference to this significant expense in his discussion of anticipated costs on September 16.

A more reasonable (and more literal) interpretation of the Senator's remarks is that he simply was stating his personal view as to the outcome when, as the Senate Committee Report provides, the issue of dependents' benefits was resolved according to existing Title VII princi-

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[18] The Commission relies upon the following sentences taken from Senator Bayh's statement of September 16, 1977:

> There remains the question, however, of whether dependents of male employees must receive full maternity coverage if the spouses of female employees are provided complete medical coverage. While it is difficult to second-guess the courts, I feel that the history of sex discrimination cases under the 14th amendment in addition to previous interpretations of the Title VII regulations relating to the treatment of dependents will require that if companies choose to provide full coverage to the dependents of their female employees, then they must provide such complete coverage to the dependents of their male employees.

Legislative History at 75. It appears from this statement that either the Senator misspoke or he misunderstood the case law under the Fourteenth Amendment. In 1974, the Supreme Court had ruled that the decision not to include pregnancy disability in a disability insurance program did not constitute invidious discrimination violative of the Equal Protection Clause of the Fourteenth Amendment. *Geduldig v. Aiello*, 417 U.S. 484.

ples, rather than under the PDA. Similarly, the statement by Senator Cranston relied upon by the Commission was acknowledged by the Senator to be his "own view" on a matter the Senate Committee had not addressed.[19]

Under the general principles used in interpreting legislative history, such personal views by individual legislators are accorded very little weight in determining the intent of Congress:

> [I]t can reasonably be argued that any legislator's remarks which throw light on the meaning of [the statute's] words should be admitted . . . . Although generally entitled to little probative weight, the value of such remarks could be left to depend upon how well informed their author appeared to be and how well he seemed to represent the views of his colleagues.

2A Sands, Sutherland Statutory Construction § 48.13 (4th ed. 1973).

In this instance, both Senators appear to be expressing nothing more than their own views on existing Title VII principles, rather than speaking on the scope of specific language in the bill under consideration, and Senator Bayh appears to be misinformed about existing law.[20] The remarks of these individual legislators are entirely insufficient to contradict the plain meaning of the statute itself and the straightforward language in the Senate Report indicating that the legislation applies only to pregnancies of employees. Indeed, in *EEOC v. Lockheed*, the court carefully analyzed the legislative history and reached precisely this conclusion. The Ninth Circuit reasoned that, any ambiguity from the Bayh and Cranston statements notwithstanding, "the Senate Committee Report leaves no room for doubt" that the purpose of the legislation was to protect women workers and that the

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[19] Legislative History at 131.

[20] See note 18, *supra*.

question of dependents' benefits was to be answered by basic principles of Title VII which were unaltered by this statute.[21]

In addition to the remarks of Senators Bayh and Cranston, the Commission has sought support for its view in other so-called "legislative materials." In fact, none of these additional statements originated in the legislature.[22] The Commission has placed heavy emphasis on corres-

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[21] *Lockheed*, 680 F.2d at 1245-1246. In *Newport News*, the Fourth Circuit's majority opinion places significant weight on the individual views of Senators Bayh and Cranston. The Fourth Circuit decision does not reflect the thorough consideration of the legislative history evident in the *Lockheed* opinion, however, and to the extent that the Fourth Circuit relied on the remarks of those individual legislators, its decision suffers the same weakness as the Commission's arguments here in that it is contrary to the language of the Senate Report indicating that the PDA applies only to the pregnancies of employees.

[22] In footnote 12 of the EEOC Brief filed in response to the petition for writ of certiorari, the Commission seeks to rely on cost figures, presented during testimony by an opponent of the bill, as an indication of the bill's broad scope. In assessing the impact of this particular testimony, the response of the committee members at the House hearings should not be overlooked. Immediately following the cited testimony, Congressman Sarasin told the witness: "Somehow it is not getting through to me. Maybe I will get a chance to discuss it further with you. I am not sure that I understand the point you are making." Hearings on H.R. 5055 and H.R. 6075 Before the Subcommittee on Employment Opportunities of the House Committee on Education and Labor, 95th Cong., 1st Sess. (April 6, 1971), at 121. Subsequently, Congressman Weiss stated:

> I am not sure that I had any better luck understanding the thrust of the witness who testified on the last panel than Mr. Sarasin. But what he was saying, I think, was, or at least as I perceived it, was that the amendment we are talking about seems to be directed toward pregnant workers, and his concern seemed to be directed toward the wives of male workers, the pregnant wives of male workers.

Hearings at 187. These statements appear to undercut the Commission's assumption that the Congress shared this witness's view as to the scope of the bill.

pondence from outside the legislative history which was belatedly introduced in this case at the appellate level. See EEOC Brief at 12-13. These letters by agency officials do not at any point purport to state the views of Senator Javits or any other legislator. Indeed, not only did Senator Javits never incorporate this correspondence into the legislative history, but he made it clear in his remarks during the floor debate that the purpose of the bill was to prevent discrimination against "pregnant women employees." See statement of Senator Javits cited at p. 13, *supra*.

There is no indication that these materials from outside the legislative history, rather than the language of the Senate Report, reflect the intent of Congress as a whole at the time the law was passed. These slender reeds offered by the Commission serve only to emphasize that the Commission is seeking an interpretation of the Act which goes well beyond the plainly expressed intent of the Congress. The Commission has failed to produce clear and convincing evidence from the legislative history that Congress intended the limited language of the PDA to be read in such an expanded fashion.

III. THE APPROACH OF THE FOURTH CIRCUIT MAJORITY IS CONTRARY TO THE PRINCIPLES OF TITLE VII WHICH CONGRESS INTENDED WOULD APPLY TO THE QUESTION OF DEPENDENTS' BENEFITS.

The district court correctly read the legislative history, which explicitly provided that the new Pregnancy Discrimination Act did not reach the issue of dependents' benefits and that questions of dependents' benefits would have to be resolved using existing principles of Title VII law. At the time Congress spoke these words, the existing principles of Title VII provided that the exclusion of pregnancy-related benefits from a disability program did not constitute gender-based discrimination and that, absent a showing of gender-based effect, there can be no vio-

lation of Title VII. These principles had been enunciated by the Supreme Court in *General Electric Co. v. Gilbert*, 429 U.S. 125 (1976), which, of course, was the decision that prompted the Congress to take legislative action to prohibit discrimination against pregnant employees.

Thus, the district court was faced with the following considerations. Congress had stated, in very straightforward language, that its intention in the Pregnancy Discrimination Act was to protect pregnant employees against arbitrary barriers to equal employment opportunity. In similarly straightforward language, Congress also stated that the Pregnancy Discrimination Act did not change the application of Title VII to sex discrimination in any other way;[23] that the Act did not reach the question of dependents' benefits; and, that questions of dependents' benefits were to be resolved on the basis of existing Title VII principles rather than by reference to the new Act.[24] The district court here (and the Ninth Circuit in *Lockheed*) gave due weight to each of these considerations and properly reasoned that in situations not involving pregnant employees (or applicants for employment) the denial of pregnancy-related benefits is not gender-based discrimination.

In contrast to this reasoning, the Commission urges the Court to adopt a rule providing that merely because a pregnancy is involved, there is a gender-based impact on the *employee*. Such an assumption of gender-based impact on the employee cannot be made in cases where the employee is not pregnant. The weakness in the Commission's approach becomes apparent when one tries to follow the gender-based impact along a line from the initial pregnancy classification back to the employee who is alleged to be the victim of discrimination. If the preg-

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[23] S. Rep. No. 95-331 at 4, *reprinted in* Legislative History at 41.

[24] S. Rep. No. 95-331 at 5-6, *reprinted in* Legislative History at 42-43.

nant individual is herself that employee, the path is traveled in a single step, and the basis for that step is the Pregnancy Discrimination Act which provides that classification on the basis of pregnancy is gender-based discrimination against the pregnant person. But, when it is a dependent who is pregnant, an extra step is necessary if gender-based impact is to reach the non-pregnant employee. The Commission must demonstrate not only that there is an impact on the non-pregnant employee, but also must show that the impact is gender-based. The flaw in the Commission's approach to the issue is that it has made this extra leap without any statutory justification.

The Commission's brief cites no authority to show that the impact on the non-pregnant employee is gender-based. In the final portion of its brief, the Commission does cite cases to show that a male employee may have a legitimate cause of action under Title VII for sex discrimination. But, in each of those cases, the gender-based impact on the male employees was demonstrated by the fact that the employer had been treating all males in one manner and all females in another. In *Chastang v. Flynn & Emrich Co.*, 541 F.2d 1040, 1042 (4th Cir. 1976), (EEOC Brief at 6 n.6), for example, the vesting provisions of the employer's retirement plan were different for men than for women. A female employee's share of the pension fund vested at the rate of 10% a year, while a male employee's share of the fund vested at 5% a year. This practice created two groups of employees, one group exclusively male and the other group exclusively female. In each of the other cases cited by the Commission, the challenged employment practice had a similarly obvious gender-based impact on the complaining employees. See *EEOC v. Colby College*, 589 F.2d 1139 (1st Cir. 1978) (employer plan paid males smaller death benefits than female counterparts); *Rosen v. Public Service Electric and Gas Co.*, 477 F.2d 90 (3rd Cir. 1973) (employer maintained different mandatory retirement age for men than for women); *Diaz v. Pan American World Airways,*

Inc., 442 F.2d 385 (5th Cir. 1971) (employer restricted its hiring for job of flight cabin attendant to females).[25]

Thus, the Commission's discussion of basic Title VII principles offers no authorization for the Commission to leap from the fact of a pregnancy classification in the dependents' benefit plan to the conclusion that the classification has an impact on employees which is so inextricably sex-linked in its consequences as to be a violation of Title VII. Instead, in its effort to show gender-based impact on the employee, the Commission has relied simply on *a fortiori* reasoning.[26]

The inappropriateness of such reasoning here is demonstrated by using the type of analysis applied by this Court in *Geduldig v. Aiello*, 417 U.S. 484, 496-497 (1974). The lack of identity between the excluded disability (pregnancy) and the gender of the alleged victim of discrimination is significantly greater under the Shipyard's program than under the program at issue in *Geduldig*.[27]

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[25] It should be noted that *Faraca v. Clements*, 506 F.2d 956 (5th Cir. 1975), cited in the Commission's discussion of basic Title VII principles (EEOC Brief at 6), involved a claim filed under 42 U.S.C. § 1981 rather than under Title VII.

[26] The issue in this case, of whether the statute itself authorizes such a presumption of sex-linked impact, should not be confused with those cases in which there has been *evidence* introduced to show that an otherwise facially neutral requirement has a significantly discriminatory impact. *See, i.e., Dothard v. Rawlinson*, 433 U.S. 321 (1977).

[27] In *Geduldig*, the Court reasoned that the disability program divided the employees "into two groups—pregnant women and nonpregnant persons. While the first group is exclusively female, the second includes members of both sexes." 417 U.S. at 497. See also, *EEOC v. Lockheed*, 680 F.2d at 1246-1247. Similarly, see the concurring opinion of Judge Wright in *Lockheed* concluding that:

> This exclusion affects both male and female employees. While a male employee bears the cost of his spouse's pregnancy, a female employee bears the cost of her daughter's pregnancy. The coverage of risks for the two groups (females with dependents and males with dependents) is equivalent. The value of the coverage and the cost of the pregnancy exclusion may vary

If the Shipyard employees are divided into two groups simply according to which ones have pregnant dependents and which ones do not, both groups would include members of both sexes, since both males and females can have pregnant dependents. If, following the Commission's approach, the spouse is treated separately from other dependents, then the employees may be divided into two groups according to which ones have a pregnant dependent spouse. While it may be assumed that the employees in the one group (i.e., those with a pregnant dependent spouse) are all male, it must be acknowledged that the other group would include the females plus a significant number of males (i.e., males with no spouse; males with a non-pregnant dependent spouse; males with a pregnant spouse who is not a dependent). Thus, it appears even less valid here than it was in *Gilbert* to argue that the alleged discrimination is inextricably sex-linked. Although Congress declared after *Gilbert* that distinctions on the basis of pregnancy are inextricably sex-linked with respect to pregnant employees, it did not go further and declare that distinctions based on whether employees have a pregnant dependent spouse are so inextricably sex-linked as to constitute discrimination against male employees.

The legislative history of the PDA makes frequent references supporting the words of Justice Stevens in his dissent in *Gilbert*:

> The rule at issue places the risk of absence caused by pregnancy in a class by itself. By definition, such a rule discriminates on account of sex; for it is the capacity to become pregnant which primarily differentiates the male from the female.

429 U.S. at 161-162. In the PDA, Congress stated clearly that arbitrary distinctions on the basis of pregnancy discriminated against female employees because

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among individual employees, but this is a necessary incident to group health insurance, as the Court noted in *Manhart*.

680 F.2d at 1247.

it is the capacity to become pregnant which primarily differentiates the male from the female. But Congress did not intend to change the existing principles of Title VII in any other way. Surely Congress never contemplated that its actions would be construed by the Commission as a declaration that it is the capacity to have a pregnant dependent spouse which primarily differentiates the male from the female. The PDA offers no basis for the Commission's interpretive guidelines on dependent's benefits, and the principles of Title VII offer the Commission no basis for its *a fortiori* reasoning here that pregnancy-related distinctions in benefits to dependents are so inextricably sex-linked in their consequences as to constitute sex discrimination against male employees. The district court, therefore, properly concluded that the Commission's interpretation is without statutory support.

CONCLUSION

For the foregoing reasons, the Equal Employment Advisory Council respectfully urges this Court to reverse the decision of the Fourth Circuit with instructions to enter a decision consistent with the reasoning of the dissent in the Fourth Circuit and the reasoning of the Ninth Circuit in the *Lockheed* decision.

Respectfully submitted,

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